No. 86-969

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

IRVING A. KANAREK,

Petitioner,

vs.

JOSEPH WAMBAUGH, et al.;
COURT OF APPEAL OF THE
STATE OF CALIFORNIA,
SECOND APPELLATE DISTRICT,
DIVISION THREE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Does conflict in the Circuits, conflict with this Court's decisions, the supervisory power of this Court, 28 U.S.C. 455(a) and F.R.C.P. 63 invoke certiorari and nullify both the arbitrary, tremendous, and confiscatory $39,701 attorneys fees assessed and Summary Judgment against petitioner, a Civil Rights plaintiff, where there are grounds to disqualify the District Judge who granted a non-final Summary Judgment and said Judge suffers an F.R.C.P. 63 disablement before determining the exent of attorneys fees, if any, which matter he submitted for his determination, another Judge, unfamiliar with the matter, taking over, over objection of petitioner?

2. Does a Federal Court of Appeals, here the Ninth Circuit, in making an in camera determination, uncommunicated to petitioner, that petitioner's appeal is frivolous with summary and complete cut-off of oral argument in violation of both F.R.C.P. 34(a) and Ninth Circuit Rule 3(b) followed by affirmance of District Court and sanctions of $39,701 in attorneys fees invoke certiorari based on supervisory powers of this Court over Courts of Appeals and Fifth Amendment Due Process?

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THE NINTH CIRCUIT

The petitioner, Irving A. Kanarek, respectfully prays that a Writ of Certorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above

entitled proceeding on May 15, 1986.

OPINION BELOW

The "Memorandum" opinion of the Court of Appeals for the Ninth Circuit is unreported, and is reprinted in Appendix A hereto.

The "Order Granting the Defendants' Motion for Summary Judgment" of the United States District Court for the Central District of California (Lucas, D.J.) has not been reported. It is reprinted in Appendix B hereto.

JURISDICTION

Invoking federal jurisdiction under 42 U.S.C. 1983, 42 U.S.C. 1985 and 42 U.S.C. 1986, the petitioner brought this suit in the Central District Court of California.

On January 23, 1984, a District Court Judge, who shortly thereafter left the federal bench, made an "Order Granting Defendant's Motion for Summary Judgment" as to those respondents, including the Court of Appeal of the State of California, who made Motions to Dismiss converted without notice and unilaterally by said District Court judge under F.R.C.P. 12(b)(6) into an F.R.C.P. 56 Motion for Summary Judgment, in favor of said respondents, see Appendix B, infra; subsequently, after the aforementioned District Court judge left the federal bench, assessment of the gigantic amount of some $39,701 in attorney fees (including those assessed by the Ninth Circuit) was made over objection of petitioner; the Summary Judgment order was not ordered to be final by the District Court judge who made it and then became disabled. Over a year after the disabled judge left the federal bench, and

then, of course, by a different federal judge than the one who made the Summary Judgment order, the Summary Judgment was purportedly finalized pursuant to F.R.C.P. 54(b), over the objection of petitioner.

Petitioner appealed to the Ninth Circuit which court, summarily cancelling oral argument, affirmed the District Court on May 15, 1986, assessing an additional $15,573.75 over that assessed in the District Court against petitioner, making the total attorney fees assessed against petitioner some $39,701. Petitioner filed a timely petition for rehearing suggesting a rehearing en banc; on July 8, 1986, the rehearing was denied and the suggestion for a rehearing en banc was rejected.

The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. 1254(1) by the filing of this timely Petition for Writ

of Certiorari subsequent to extensions of time allowing until December 5, 1986 for said filing (A-246) by Justice O'Connor.

CONSTITUTIONAL PROVISIONS, STATUTES, RULES AND REGULATIONS INVOLVED

United States Constitution; Fifth Amendment and California Constitution, Article 6, Sec. 7.

Ninth Circuit Rule 3(f) and 3(f)(1). California Penal Code, Section 134. Title 28 United States Code, Section 455(a); 1254(1); Section 1738; Title 42 United States Code, 1983, 1985 & 1986.

F.R.A.P. 34(a); F.R.C.P. 12(b)(6), 34(a), 54(b), 56, 59, and 63.

LIST OF PARTIES INVOLVED

The parties to the proceedings below were the petitioner, Irving A. Kanarek and Respondents Joseph Wambaugh; Dell Publishing Co., Inc., a New York corporation; Dell Publishing Co., Inc., dba Dial Delacorte Press; Dial Delacorte Press, a corporation; Dell Publishing Co., Inc., dba Delacorte Press; Delacorte Press, a corporation; Dell Publishing Co., Inc. dba Dial Press, Inc.; Dial Press, Inc., a corporation; Helen Myeer; Helen Meyer dba Dell Publishing Co., Inc., Irving Feffer; Ross Claybourne; John R. Pennington, J. J. Mittermiller, Sheppard, Mullen, Richter and Hampton, a partnership, including professional corporations; Court of Appeal of the State of California, Second Appellate District, Division Three.

The County of Los Angeles, Ms. Hahn, Deputy County Clerk, S. Reynoso, Deputy Clerk, and G. Padilla, Deputy County Clerk answered in the District Court and are not now litigants.

STATEMENT OF THE CASE

Petitioner, an attorney, instituted this action pursuant to 42 U.S.C. 1983, 1985 and 1986.

Petitioner had previously filed a libel action in the Los Angeles County Superior Court against respondent Joseph Wambaugh (purported author of "The Onion Field") and others, some of them respondents herein; in said Superior Court a Summary Judgment was granted against petitioner, not on the merits, but because petitioner was supposedly a public figure, a proposition which is simply not the case; in truth and in fact, the lies in that book have caused petitioner extreme financial hardship which he still suffers.

Petitioner perfected an appeal of the Los Angeles Superior Court summary judgment ruling to the Court of Appeal of

the State of California. This appeal progressed to the point that petitioner had in fact filed his opening brief in said California Court of Appeal after the non-California Court of Appeal respondents herein in fact opposed an extension of time requested by petitioner herein for the filing of said opening brief in the said California Court of Appeal.

The Los Angeles Superior Court certified record was filed in said California Court of Appeal on November 27, 1981. Said record did not have documents in it that the non-California Court of Appeal respondents herein wished to have before said California Court of Appeal. These non-California Court of Appeal respondents herein had been dilatory and were apprehensive that if they made a motion to said California Court of Appeal to augment the record before said California Court of

Appeal, said court would deny the motion. They, the non-California court of Appeal respondents, then entered into a scheme in concert with several Los Angeles County Superior Court clerks to create false, unauthenticated, illegal and uncertified documents to assist the non-California Court of Appeal respondents herein in defense of petitioner's appeal. Without any court approval whatsoever, the non-California court of Appeal respondents herein pursuant to the scheme entered into with the aforementioned Deputy Los Angeles County Superior Court clerks caused said clerks to request of petitioner a spurious clerk's transcript fee of $361.80 to pay for this non-existent portion of the clerk's transcript. Thus, pursuant to said scheme illegal documents were transmitted by the non-California Court of Appeal respondents herein to said clerks on January 18, 1982 without informing

petitioner or any court of the transmittal, and the request of petitioner for "payment" of the spurious $361.80 was sent to petitioner on January 21, 1982 by said clerks. The filing of false documents for use in a court constitutes a felony under California law; California Penal Code, Sec. 134. Petitioner refused to pay the illegal $361.80 extortion. The respondent California Court of Appeal was then hoodwinked into dismissing the appeal by the device of said clerks informing said Court petitioner had not paid for what the clerks and the non-court respondents herein knew to be a non-existent, false, unauthorized, illegal and uncertified record. In fact, the non-California Court of Appeal respondents herein made the motion in the California court of Appeal to dismiss petitioner's appeal for not paying the spurious $361.80 clerk transcript fee knowing full well that the $361.80 "fee"

was illegal and based on an illegal, false, non-existent, uncertified record. The hoodwinked respondent California Court of Appeal granted the motion to dismiss petitioner's State appeal, denied a timely petition for rehearing and the California Supreme Court denied a timely petition for hearing.

Petitioner then filed the instant action; the County of Los Angeles and said deputy clerks answered and are not now before this Court. The non-California Court of Appeal respondents and the respondent California Court of Appeal made motions to dismiss which were converted suddenly by written communication from the District Court by way of F.R.C.P. 12(b)(6) into a F.R.C.P. 56 motion for summary judgment which the District Court granted against petitioner on January 23, 1984, Appendix B-1, et seq., infra, without allowing oral

argument. In said January 23, 1984 order District Court Judge Lucas found respondent California Court of Appeal to be absolutely immune from injunctive action; that res judicata and collateral estaoppel bar petitioner's claims against the non-California court of Appeal respondents herein; that petitioner was in bad faith in instituting a frivolous, vexatious, and unreasonable lawsuit; and the Honorable Malcolm M. Lucas, the District Court Judge granting the Summary Judgment, which he did not make a final judgment, ordered that he, Judge Lucas, would "determine the proper amount" of attorney fees to be submitted (to him) as of February 8, 1984. He shortly thereafter left the federal bench without deciding the amount of any attorney fees.

Since at least mid-December, 1983, Judge Lucas knew he was being considered for nomination by the Governor of California

his ex-law partner, to the California Supreme Court which nomination he subsequently received. He declined to disqualify himself from this case although timely Motion for Disqualification was made and he knew that as a nominee for the position of Associate Justice of the California Supreme Court he would be judged as to whether or not he would be approved for that position by the Commission on Judicial Appointments pursuant to Article 6, Section 7 of the California Constitution; said commission consists of the Chief Justice of the California Supreme Court, the Attorney General of California, and a member of the respondent California Court of Appeal; the California Attorney General, John Van de Kamp, the attorney for respondent California Court of Appeal herein, and Justice Ruth of Respondent California Court are members of the aforementioned Commission

on Judicial Appointments.

The timely motion to disqualify the District Court Judge, the Honorable Malcolm M. Lucas, from the instant matter in the District Court was heard by a colleague of Judge Lucas on the District Court. Said Motion was denied and such denial was upheld by the Ninth Circuit affirmance herein.

The Ninth Circuit states in its UNPUBLISHED OPINION that its purpose in sanctioning tremendous, punitive attorney fees against petitioner is "to discourage misuse of the judicial process" and that petitioner's appeal "is an attempt to assert meritless claims solely to harass the defendants" and that petitioner's suit was "frivolous and intended to harass, not to assert legitimate civil rights," infra, App. A, pp. 7 and 8; the Ninth Circuit summarily cancelled oral argument immediately before the scheduled hearing.

REASONS FOR GRANTING THE WRIT

I

THE NINTH CIRCUIT'S CONFLICT WITH OTHER CIRCUITS, CONFLICT WITH DECISIONARY LAW OF THIS COURT, AND CONFLICT WITH F.R.C.P. RULES REGARDING DISABILITY AND DISQUALIFICATION OF JUDGES NECESSITATES A GRANT OF CERTIORARI.

The January 23, 1984 "Order Granting Defendants Motion for Summary Judgment" infra, App.B1, et seq., was an interlocutory order since it was not made a final judgment pursuant to F.R.C.P. 54(b) by Judge Lucas, the disabled judge. In addition, the January 23, 1984 order makes it clear that Judge Lucas intended to make a determination as to the "reasonableness" of the attorney fees which would be requested, infra, App.B28. Also, in fact, he may have ordered no fees at all, for instance, to those respondents represented by John

Sturgeon, since Judge Lucas ordered declarations on behalf of those who requested attorney fees filed by January 27, 1984, and the Sturgeon declarations were not filed until February 1, 1984 with no leave obtained to permit the late filing. The District Judge who replaced the disabled Judge Lucas ordered to the penny the entire unjustified $17,046.00 requested by Sturgeon assessed against petitioner and refused a hearing to justify this confiscatory, tremendous, unwarranted assessment which does not, as is the case for the entire $39,701, comport with the decisionary law set out by this Court. See Hensley v. Eckerhart, 461 U.S. 429 at 440-441 where Chief Justice Burger in a concurring opinion states:

> "A district judge may not, in my view, authorize the payment of attorney's fees unless the attorney

involved has established by clear and convincing evidence the time and effort claimed and shown that the time expended was necessary to achieve the results obtained."

Chief Justice Burger then goes on to point out there is "no relationship of trust and confidence between the adverse parties" so that there must be shown "the nature and need for the service" and fees allowed must be "reasonable." The task of determining what was reasonable was reserved by Judge Lucas as a factual matter to be determined by him, himself, infra, App. B, pp. 26-28; he had handled that case from its inception. The Reporter's Transcript of May 17, 1984 at page 9, reveals that the District Judge who replaced Judge Lucas, Judge Hupp, stated, referring to the instant case, "I haven't even had a chance to look at the

background of the case" and reiterated at page 10, "I haven't had a chance to read the background of this matter" and states also at page 10, "As you know, I'm in trial. You saw all the lawyers with this anti-trust case here." Nevertheless, on May 21, 1984, this same heavily work-burdened judicial officer who had no knowledge of the case, over petitioner's objection, assessed attorney fees to the penny of that which was requested, $19,671.25; no meaningful and valid consideration of petitioner's motion for new trial, petition for new hearing, motion to set-aside, alter or amend summary judgment, motion to correct the "Facts" and matters set out under "Discussion" at pages 3-10, inclusive, of the order granting defendants' motion for summary judgment, all timely and pursuant to F.R.C.P. 59, could be made or was made by Judge Hupp who replaced Judge Lucas;

Judge Hupp also purported to deny the filing of the timely and properly requested Second Amended Complaint even though the matter was not on his calendar; it had been on a March 18, 1984 calendar, a time before which this case had been purportedly transferred to Judge Hupp from Judge Lucas.

A salient point is that there is a conflict between the Ninth Circuit and established law interpreting F.R.C.P. 63 in other Courts of Appeal requiring Certiorari by this Court to resolve said conflict; Whalen v. Ford Motor Credit Co., 684 F.2d 272 (C.A. 4th), cert. denied, 103 S.Ct. 216, makes it clear that if a District Judge is disabled from continuing before the evidence is completed and decision made, a new trial must be had on the incompleted matter. Thus, whether it is a jury trial or a matter decided by a judge without a jury, F.R.C.P. 63 mandates a new trial on

a matter submitted but not yet decided before the judge becomes disabled. Arrow-Hart, Inc. v. Philip Carey Co., 552 F.2d 611 (C.A. 6th, 1977); Havey v. Kropp, 458 F.2d 1054 (C.A. 6th, 1972); Bromberg v. Moul, 275 F.2d 574 (C.A. 2nd, 1960); Brennan v. Grisso, 198 F.2d 532 (D.C. Cir., 1952).

Whalen, supra, was a 4th Circuit jury trial matter while the four cases cited immediately above from the Courts indicated were non-jury matters. Thus, the conflict with the Ninth Circuit in that, in the instant Ninth Circuit case petitioner did not consent to District Judge Hupp deciding the matter of what is "reasonable" attorney fees herein, yet a new proceeding to determine the amount of attorney fees, if any, was not allowed although timely and proper demand for same was made by petitioner since Judge Lucas was disabled from acting having left the Federal bench.

There is also a conflict between the Ninth Circuit with decisions of this Court pin-pointed by the issue as to whether or not Judge Lucas was disqualified from proceeding to any decision in the case because he knew at the time he made the purported Summary Judgment decision in the instant case, and sooner, that his fitness for the California Supreme Court would be decided by a majority of the three members of the Commission on Judicial Appointments two of whom were California Attorney General Van de Kamp, Attorney for Respondent California Court of Appeal, and a Justice of said Respondent California Court of Appeal; the third member is the Chief Justice of the California Supreme Court.

Pursuant to 28 U.S.C. 455(a) the law provides that,

"Any justice, judge, or magistrate of the United States shall

disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

This Court has stated that "Every procedure which would offer a possible temptation to the average man as a judge...." "not to hold the balance nice, clear, and true between the State and the accused denies the latter due process of law." Tumey v. State of Ohio, 273 U.S. 510, 532, 47 S.Ct. 437, 71 L.Ed. 749. Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way "justice must satisfy the appearance of justice." Offutt v. United States, 348 U.S. 11, 14, 75 S.Ct. 11, 13, 99 L.Ed. 11. (See In re Murchison,(1955) 75 S.Ct. 623, 625, 349 U.S. 133, 136, 99 L.Ed. 942, per Black, J.).

In the instant case, Judge Lucas knew his impartiality was in fact reasonably questioned.

Thus there is a conflict between the decisionary law of this Court and the Ninth Circuit which affirmed the action of Judge Lucas in the instant case despite the fact that he knew he was going to be judged as indicated, supra, by the Attorney General of California, John Van de Kamp, attorney for Respondent California Court of Appeal herein, and a Justice of said Respondent California Court of Appeal, and Certiorari must be granted to resolve the conflict.

II

THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER THE SUPERVISORY POWER OF THIS COURT MUST BE USED TO PREVENT ARBITRARY, LAST MINUTE CANCELLATION OF ORAL ARGUMENT BY A FEDERAL COURT OF APPEALS, HERE THE NINTH CIRCUIT, WHICH SANCTIONED AN ILLEGAL UNSUBSTANTIATED, HUGE $39.701.00 ASSESSMENT OF ATTORNEYS FEES AND AFFIRMED A "NO ARGUMENT ALLOWED" SUMMARY JUDGMENT.

F.R.A.P. 34(a) and Ninth Circuit R. 3 (f) were violated in the instant case. Petitioner's office received a phone call from the office of the clerk of the Ninth Circuit that oral argument would not take place; this call came near the end of the work day on Friday, April 4, 1986 with oral argument scheduled for Monday, April 7, 1986. Thus, the provision in said 3 (f), supra, that the notice be in writing was not met; nor, was the seven day provision for filing a "statement setting forth the reasons why" "oral argument should be heard", possible.

Assuming, arguendo, that the "specific finding" referred to in 3 (f) comports with Fifth Amendment due process, such did not occur in the instant case necessitating that this Honorable Court exercise its supervisory powers, grant certiorari, and thus, make sure that in other similar situations in the Ninth Circuit and other Federal Courts of Appeals that the pertinent rules be followed.

A timely "specific finding" by the Ninth Circuit as provided by Ninth Circ. R. 3(f) would have informed petitioner that the panel was unanimously of the opinion that the appeal was frivolous. Ninth Circ. R. 3(f)(1). Petitioner then would have responded within the aforementioned seven day period provided by said Ninth Circ. R. 3(f) to give reasons

why oral argument should have been heard. Fifth Amendment due process requires that petitioner be given the prescribed notice of the unanimous opinion of the three judges on the panel that the appeal was frivolous. Thus, the protection afforded petitioner by F.R.A.P. 34(a) and Ninth Circ. R. 3(f) was denied him here. The reasons referred to, supra, speak on behalf of the proposition that this Court should grant certiorari, as aforesaid.

The reasons for this include considerations such as those suggested by language in Christiansburg Garment Co. vs. Equal Employment Opportunity Commission 54 L.Ed. 2d 648 at 657 where this Honorable Court cautions against the chilling effect of what has occurred here (the unwarranted, arbitrary, and tremendously confiscatory assessment

against petitioner of $39,701.00 in attorneys fees); at said p. 657 this Court points out the criteria to be applied in determining attorney fees to be assessed where the defendant prevails: but first, of course, the defendant must prevail; a reason for oral argument to be presented was that as suggested by Christiansburg, supra, at p. 657, "The law may change or clarify in the midst of litigation". On January 25, 1984, the day the Summary Judgment in the District Court was entered, infra, App.B28, this Court had not yet decided Pulliam v. Allen 466 U.S. 522, 80 L.ed. 2d 568, 104 S. Ct. 1970 (1984); nor had this Court yet decided Malley vs. Briggs, 106 S.Ct. 1092 (discussed, infra). At the Ninth Circuit, petitioner intended to argue that Pulliam was especially applicable

since what petitioner seeks is injunctive relief against the Respondent California Court of Appeal to restore his appeal not money damages; thus, petitioner intended to point out respectfully in argument that the Summary Judgment erroneously found petitioner to be unreasonable and in bad faith, infra, App.B 26, by naming Respondent California Court of Appeal and its individual justices in the suit (the Summary Judgment erroneously speaks of the "individual justices" in the suit since the First Amended Complaint is the present operative pleading; a Proposed Second Amended Complaint which has not been approved for filing but proposed by timely appropriate motion names individual justices); the Summary Judgment cited Pierson v. Ray 386 U.S. 547 (1966) for the proposition of absolute

immunity from suit, infra, App. B , Petitioner intended in argument to point out, further, that the Pulliam court, supra, at 80 L. Ed. 2d 578 adopted as part of its opinion the dissenting language in Pierson v. Ray, 87 S. Ct. 1213 to the effect that "(every Member of Congress who spoke to the issue assumed that judges would be liable under Section 1983.)"; furthermore, petitioner wanted to argue at the Ninth Circuit that at pp. 578 - 579, in Pulliam, supra, this Court makes it clear that petitioner certainly is not in bad faith for seeking injunctive relief; for instance at p. 578, this court states after the above quotation, with approval from this dissent in Pierson v. Ray, "Subsequent interpretations of the Civil Right Acts by this Court acknowledge Congress'

intent to reach unconstitutional actions by all state actors, including judges". Thus, the Ninth Circuit decision below in 85-5896, the instant case, infra,App. A6, finding absolute immunity is in conflict with this Court in Pulliam, supra. Another reason for arguing in the Ninth Circuit against the proposition that petitioner's appeal was frivolous was this Court's finding in Pulliam, supra, at p. 579 that "We remain steadfast in our conclusion, nevertheless, that Congress intended Section 1983 to be an independent protection for federal rights and find nothing to suggest the common-law doctrine of judicial immunity to insulate state judges completely from federal collateral review." (Emphasis added).

Pulliam, supra, indicates that

collateral review is available especially by way of injunctive actions against state court judgments. Thus, there is a conflict between the decisionary law of this Court, Pulliam, supra, and the Ninth Circuit, 85-5896, the instant case, infra, App. A5, which recites as an immutable principle that Federal Courts give full faith and credit to state court judgments and that this preclusive effect is not lessened in civil rights actions citing 28 U.S.C. 1738, Migra v. Warren City School Dist. Education, 465 U.S. 75, 85 (1984) and Takahachi vs. Board of Trustees, 783 F.2d 848, 850 (9th Cir. 1986). However, petitioner was not allowed to argue either in the Ninth Circuit or in the District Court which would not allow oral argument after it suddenly and unilaterally invoked

F.R.C.P. 12(b)(6) to convert motions to dismiss into F.R.C.P. 56 motions for Summary Judgment notwithstanding express provision for oral argument in F.R.C.P. 56.

Petitioner points out that Migra is clearly distinguishable from the instant case since in the California State court the gist of Petitioner's suit was libel, with the Civil Rights matter arising only after and from the deliberate, consumated obliteration of petitioners appeal by state action (Tower v. Glover, 104 S.Ct. 2820), the knowing, deliberate, conspiritorial, concerted action between and among governmental actors, Los Angeles County Superior Court clerks, hereafter"clerks", and the non-California Court of Appeal respondents herein (See STATEMENT OF CASE, p. 7 et seq., supra) wherein, there was violation of California Penal Code 134 they created out of whole cloth the spurious request for the $361.80

for the duplication of a non-existent Court record, supplying false papers to make it appear the record to be duplicated existed, and then hoodwinked the Respondent California Court of Appeal into dismissing petitioner's appeal because petitioner would not succumb to the extortion of paying the illegal, spurious $361.80 charge. (See the District Court Summary Judgment, Appendix B - p. 21, and Ninth Circuit Judgment, Appendix A - p. 6 which purport to find no state action notwithstanding that conspiracy and conserted action were before the District Court and the Ninth Circuit).

The obliteration of petitioner's appeal constitutes a denial of due process which manifestly shows the conflict between the Ninth Circuit and this Court decisionary law since this Court has held that if there is a denial of due process, state court proceedings are not necessarily entitled to

full faith and credit, Winston v. Lee, 105 S.Ct. 1611, 84 L.Ed.2d 662 and see also Lee v. Winston, 717 F.2d 688. The Ninth Circuit, Appendix 5 - p.7, states in the instant case,

> "We recently dismissed an appeal for failure to provide a complete record, See Southwest Administrators Ins. v. Lopez, 781 F.2d 1378 (9th Cir. 1986), The California Courts may do the same"

Petitioner concurs but, as is shown, supra, such was not the case in the instant matter since here the Los Angeles Superior Court certified record was filed on November 27, 1981 (STATEMENT OF THE CASE, supra, p.8). There was no other record to certify to Respondent CALIFORNIA COURT OF APPEAL. As is shown, supra, there was a hoodwinking of the Respondent Court of Appeal that there was other record; and the proximate cause

of the hoodwinking was the overt action of the clerks and non-California Court of Appeal respondents. See Whittington v. Johnston, 201 F.2d 810 (5th Cir.) and Malley v. Briggs, 106 S.Ct. 1092 (1986), 46 CCH S.Ct.Bull. pp. B1309-B1310 wherein this Court does not absolve an actor of bad liability merely because the actor, accomplished a wrongful and/or unconstitutional result through instigating Court action; the instant case.

CONCLUSION

For these various reasons, the Petition for Certiorari should be granted; it is urged that this Honorable Court, grant summary reversal in view of the "last minute" elimination of all oral argument in the Ninth Circuit without conforming to F.R.A.P. 34(a) and Ninth Circuit Rule 3(f), summary reversal of the $39,701.00 in

attorneys fees assessed, summary reversal of the District Court judgment, and order petitioners appeal in the California Court of Appeal reinstated.

Respectfully submitted,

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APPENDIX A

FILED
MAY 15 1986
CATHY A. CATTERSON
Clerk, U.S. Court of Appeals

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

IRVING A. KANAREK, Plaintiff-Appellant, vs. JOSEPH WAMBAUGH, et al., Defendants-Appellees.	No. 85-5896 DC No. CV 83-2854 HLH
COURT OF APPEAL OF THE STATE OF CALIFORNIA, Respondent.	MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
District Judge Harry L. Hupp, Presiding

Submitted** April 7, 1986

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 21.

** The panel finds this case appropriate for submission without oral argument pursuant to Ninth Cir. R. 3(f) and Fed. R. App. P. 34(a).

Before: WRIGHT, NELSON, and KOZINSKI, Circuit Judges,

Kanarek's libel action appeal was dismissed by the California Court of Appeal for failure to post $361 to prepare the record. After he failed to have the dismissal overturned in state court, he filed this civil rights action in federal court, alleging that all those connected with the dismissal had violated his civil rights. Judge Lucas granted summary judgment for some of the defendants. After Judge Lucas was appointed to the California Supreme Court, Judge Hupp awarded attorney fees to the defendants. On April 16, 1985, Judge Hupp ordered that the summary judgment entered by Judge Lucas was final under Fed. R. Civ. P. 54(B). Kanarek appeals the summary judgment and the attorney fees. We affirm and award attorney fees and double costs for this frivolous appeal.

BACKGROUND

In Los Angeles Superior Court, Kanarek prosecuted a libel action based on the portrayal of him in Joseph Wambaugh's The Onion Field. Kanarek lost and appealed the adverse summary judgment to the California Court of Appeal.

In 1982, the superior court clerk notified Kanarek that he needed to post $361.80 to cover the costs of preparing that portion of the record on appeal requested by the defendants. Kanarek refused to deposit the money and, in April 1982, the California Court of Appeal dismissed the appeal on defendants' motion. Kanarek opposed the dismissal, petitioned for rehearing, and petitioned the California Supreme Court for review. He did not prevail.

In May 1983, Kanarek filed this district court action. He alleged that

defendants had violated his civil rights by causing his appeal in the California court to be dismissed. Judge Lucas entered summary judgment on January 23 (for defendants) and on January 25, 1984 (for respondent).

After summary judgment was entered, Kanarek sought to have Judge Lucas disqualified. This motion was denied in March 1984 by Judge Pfaelzer.

In June 1984, Judge Hupp, who had replaced Judge Lucas, granted the defendants' and respondent's motions for attorney fees and denied Kanarek's motions for a new trial and to set aside the summary judgment.

In April 1985, the court granted a Rule 54(b) motion making the summary judgments final and appealable. Kanarek filed the notice of appeal on May 15, 1985.

ANALYSIS

I. Summary Judgment

Kanarek's action attacks the judgment entered by the California courts. Instead of seeking to have the United States Supreme Court review the validity of the dismissal on direct appeal, Kanarek seeks to penalize those involved by filing a federal civil rights action.

The district court properly granted summary judgment for the defendants. Several reasons support the court's decision. First is res judicata.

Federal courts give full faith and credit to state court judgments. 28 U.S.C. § 1738. The preclusive effect of state judgments is not lessened in civil rights actions. Migra v. Warren City School Dist. Board of Education, 465 U.S. 75, 85 (1984); Takahashi v. Bd. of Trustees, 783 F.2d 848, 850 (9th Cir. 1986).

Kanarek argues that he was deprived of due process by the California dismissal. The record shows, however, that he was given notice of the impending dismissal and had an opportunity to contest it. Moreover, if he was dissatisfied with the decision of the California courts, his complaint should have been in the United States Supreme Court, not in federal district court. See 28 U.S.C. § 1257.

Second, even if we were to examine the merits of Kanarek's claim, he would not prevail. Civil rights claims must be based on state action. See 42 U.S.C. § 1983 (color of law); Gibson v. United States, 781 F.2d 1334, 1338 (9th Cir. 1986) (same). The private defendants' use of the California courts to have Kanarek's claim dismissed does not supply the necessary state action.

The claim against the California Court of Appeal is barred by absolute immunity for

actions in a judicial proceeding. See Demoran v. Witt, 781 F.2d 155, 156 (9th Cir. 1986); Sherman v. Babbit, 772 F.2d 1476, 1477 (9th Cir. 1985). Even if there were no immunity, we see nothing to indicate or even suggest that any statutory or constitutional right has been impaired. We recently dismissed an appeal for failure to provide a complete record. See Southwest Administrators, Inc. v. Lopez, 781 F.2d 1378 (9th Cir. 1986). The California courts may do the same.

II. Attorney Fees

The district court below granted the defendants' requests for attorney fees. We find no abuse of discretion and affirm the award.

Appellees have requested attorney fees on appeal. While we generally will not award attorney fees to defendants in civil rights cases, where the action asserted is frivolous and intended to harass, not to assert

legitimate civil rights, we will impose attorney fees on an abusive plaintiff to discourage misuse of the judicial process. See Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 422 (1978) (award of attorney fees against civil rights plaintiff appropriate where "court finds that [plaintiff's] claim was frivolous, unreasonable, or groundless or that the plaintiff continued to litigate after it clearly became so"). Kanarek, an attorney, knew or should have known of the frivolousness of his claims. His appeal is an attempt to assert meritless claims solely to harass the defendants.

At our request, counsel for appellees have provided the court with basic data from which we can set the attorneys' fees on appeal. From those data, we have deducted the estimated amount of time required for oral argument because the case was submitted without argument.

In response to the presentation by appellees, appellant Kanarek asserts that the appeal was not frivolous at all and, if it were, opposing counsel need not have spent so much time defending it. Kanarek's assertions are unresponsive to the court's order, which allowed him seven days "to state briefly any objections to the amount sought."

We award attorney fees against Kanarek as follows:

(1) In favor of Joseph Wambaugh, Dell Publishing Co., Inc., Delacorte Press, Dial Press, Helen Meyer, Ross Claiborn, John R. Pennington, James J. Mittermiller, and the law firm of Shepard, Mullin, Richter & Hampton in the amount of $7,774.50;

(2) In favor of Irving S. Feffer in the amount of $850.00;

(3) In favor of the Court of Appeal of the State of California in the amount of $6,913.25;

together with double costs in favor of each appellee under the authority of 28 U.S.C. § 1912 and Fed. R. App. P. 38.

AFFIRMED.

APPENDIX B

FILED
Jan 23 1984
Clerk, U.S. District
Court, Central
District of California

ENTERED
JAN 25 1984
Clerk, U.S. District
Court, Central
District of California

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

IRVING A. KANAREK, Plaintiff, v. JOSEPH WAMBAUGH, et al., Defendants and Respondents.	No. CV-83-2854-MML ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT
IRVING A. KANAREK, Petitioner, v. COURT OF APPEAL OF THE STATE OF CALIFORNIA, etc., Respondent.	

The motion to dismiss of defendants Wambaugh, et al, came on for hearing before the Court, the Honorable Malcolm M. Lucas. District Judge, presiding, on October 31, 1983. Having carefully considered the papers

filed and oral argument of counsel, the Court grants summary judgment in favor of defendants. Under Federal Rule of Civil Procedure 12(b) (6), because matters outside the pleadings were presented and not excluded in considering the motion to dismiss, the Court has converted the motion to dismiss into one for summary judgment.

FACTS

Plaintiff Kanarek seeks to reinstate an appeal in state court of a libel action decided adversely to him by summary judgment in the Superior Court.

On July 2, 1979, the Los Angeles Superior Court granted summary judgment for defendants Wambaugh and Dell Publishing Company. Kanarek had sued Wambaugh, et al, for libel, claiming that Wambaugh unfairly portrayed him in his book "The Onion Field." Kanarek had named Helen Meyer and Ross

Claiborne, Dell officers, as defendants, as well as Irving Feffer, Wambaugh's attorney. All defendants in that action except for Feffer were represented by the law firm of Sheppard, Mullin, Richter & Hampton. ("Sheppard Mullin.")

On August 27, 1979, Kanarek filed a notice of appeal in the Court of Appeal. It took about two years for the transcript of appeal to be completed. On July 28, 1981, Kanarek filed a request for correction of the transcript to include the depositions of I. A. Kanarek and Joseph Wambaugh. Defendant Wambaugh opposed the request. On November 20, 1981, Judge Weil of the Los Angeles Superior Court denied the request for correction of the transcript.

On January 21, 1982, the Superior Court clerk sent a "Supplemental Notice" to plaintiff that he was required to deposit the sum of $361.80 to cover the costs of

preparing and certifying the record.

On February 11, 1982, the Superior Court sent notice to Kanarek that the processing of his appeal had been suspended because he failed to deposit the $361.80. The notice stated that the Court of Appeal would dismiss the appeal if Kanarek failed to apply for relief from default within fifteen days. Kanarek did not pay the $361.80 and did not apply for relief.

On March 9, 1982, defendants Wambaugh, et al, represented by Sheppard Mullin, moved for dismissal of Kanarek's appeal. On April 6, 1982, the Court of Appeal for the Second District (also a respondent in this action) dismissed the appeal under Rule 5(c) of the California Rules of Court for failure to deposit fees. Kanarek's petition for re-hearing was denied by the Court of Appeal. The California Supreme Court denied Kanarek's petition for hearing on June 21, 1982.

Kanarek now brings this action under 42 U.S.C. §§1983, 1985, and 1986, alleging that defendants Wambaugh, Dell, the Dell officials, with the addition of new defendants Sheppard Mullin, the Court of Appeal, and four clerks of Los Angeles County, violated his civil rights by causeing his appeal from the Superior Court to be dismissed. Plaintiff claims that defendants and respondent acted alone and in concert "with malicious intention [to] deprive [him] of his constitutional rights, privileges and immunities with pursuing the appeal." (First Amended Complaint, ¶18). Plaintiff asks for injunctive relief reinstating his appeal, and for damages.

DISCUSSION

The Court grants summary judgment in favor of defendants, on the grounds that plaintiff's suit is barred by res judicata

(1) Res Judicata and Collateral Estoppel

Under the doctrine of res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. Allen v. McCurry, 449 U.S. 90 (1980); Cromwell v. County of Sac, 94 U.S. 351 (1876). Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case. Allen, supra at 94; Montana v. United States, 440 U.S. 147 (1978). The concept of collateral estoppel cannot apply, however, when the party against whom the earlier decision is asserted did not have a "full and fair opportunity" to litigate that issue in the

earlier case. Allen, supra at 95; Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1970). Finally, the rules of res judicata and collateral estoppel are applicable to 42 U.S.C. §1983 actions. Allen, supra at 103-104.

In the instant case, plaintiff contends that "there was no final judgment on the merits in the earlier proceeding in the Court of Appeal." (Opposition at p.4). Kanarek argues that the Court of Appeal's dismissal of the appeal was not a decision on the merits.

The Court agrees with Kanarek's contention that the Court of Appeal's dismissal for failure to pay fees was not a decision on the merits of his case. However, the Court finds that this failure to pay fees is not the issue in the instant case: The issue is whether the dismissal was

constitutionally valid, and whether that issue has already been litigated.

Plaintiff raised the issue of his constitutional rights in both petitions for rehearing before the California courts: "Plaintiff urges that the drastic action of dismissal without a hearing in the Court of Appeal and insofar as California law sanctions such drastic dismissal is violative of plaintiff's rights to procedural and substantive due process guaranteed by the federal and state constitutions."

The Court finds that Kanarek's constitutional claims have already been rejected by the California courts. Denials of the petitions for rehearing were conclusive, and this Court will not permit him to relitigate them here. Ellis v. Cassidy, 625 F.2d 227 (9th Cir. 1980); Francisco Enterprises, Inc. v. Kirby, 482 F.2d 481 (9th Cir. 1973) (Court held that res judicata

principles preclude parties from relitigating federal constitutional claims in a federal district court subsequent to an adverse determination on the merits of such claims by a state court of competent jurisdiction; the sole recourse for the losing litigant was by appeal or writ of certiorari to the United States Supreme Court).

In addition, the Court rejects plaintiff's argument that, since he has added new defendants (Sheppard Mullin, the Court of Appeal, etc.) new issues arise and the case is transformed. The Supreme Court in Parklane Hosiery v. Shore, 439 U.S. 322 (1978), allowed a litigant who was not a party to the first lawsuit to use collateral estoppel "offensively" in a new federal suit against the losing party in the first case. The Court limited this "offensive" use of collateral estoppel by stating that the party against whom the earlier decision is

being asserted must have had "a full and fair opportunity to litigate" the issue. As discussed above, plaintiff has had that opportunity.

Finally, defendants assert that plaintiff's current action is essentially an appeal from the California courts, and that this Court does not have appellate jurisdiction. The Court agrees that Kanarek should have pursued this action, if at all, as an appeal to the United States Supreme Court. In his First Amended Complaint, plaintiff seeks a reinstatement of his appeal. This is the same relief he sought when he petitioned for rehearing in the state courts. Under 28 U.S.C. §1257, principles of comity and federalism, the federal district court cannot provide appellate review of the state courts final decisions. Reynolds v. Georgia, 640 F.2d 702 (5th Cir. 1981); Francisco Enterprises, supra.

(2) The Civil Rights Act Claims

The Court grants summary judgment in defendants' favor regarding the claims brought under 42 U.S.C. Sections 1983, 1985 and 1986.

(a) The Court finds no state action in this case upon which relief may be granted. The private defendants, including the Sheppard Mullin firm, were not State officers, and they did not act in conspiracy with a State officer against whom plaintiff could state a valid claim. See Haldane v. Chagnon, 345 F.2d 601 (9th Cir. 1964).

The Court of Appeal and its individual justices are absolutely immune from liability under 42 U.S.C. §1983. Pierson v. Ray, 386 U.S. 547 (1966); Franklin v. State of Oregon State Welfare Division, 662 F.2d 1337 (9th Cir. 1981). In addition, the immunity accorded to state governmental entities under the Eleventh Amendment bars

this claim for money damages against the Court of Appeal. Edelman v. Jordan, 415 U.S. 652 (1974); Rutledge v. Board of Regents, 660 F.2d 1345 (9th Cir. 1980).

Finally, the Court finds no legal or factual support for plaintiff's contentions that the County Clerks conspired with the private defendants. Plaintiff offers one letter, written by defendant Mittermiller to defendant Hahn, in support of his conclusory allegations that defendants conspired, under color of state law, to deprive him of his civil rights by dismissing the appeal. This letter shows no evidence of any such conspiracy.

In conclusion, the Court finds that even if defendants did commit the alleged wrongful acts, they did not act "under color of state law or authority," thus, they are not subject to liability under the Civil Rights Act. See Briley v.

California, 564 F.2d 849 (9th Cir. 1977); Haldane, supra at 604-605.

(b) 42 U.S.C. §1985

Private defendants Sheppard Mullin, Wambaugh, et al., contend that plaintiff's §1985 claim must fail because they, as moving parties for dismissal of the appeal, were not the "proximate cause" of Kanarek's alleged injury. Under §1985, plaintiff is required to allege, inter alia, that the acts done in furtherance of the conspiracy resulted in an injury to the plaintiff's person or property or prevented him from exercising a right or privilege of a United States citizen. Sykes v. State of California, 497 F.2d 197 (9th Cir. 1974).

In Hoffman v. Halden, 268 F.2d 280 (9th Cir. 1959), the Ninth Circuit discussed the causation requirement in an action for violation of civil rights arising out of an alleged conspiracy tc wrongfully

incarcerate plaintiff in a mental hospital. In its analysis, the court pointed to cases holding that the acts preliminary to judicial action or decision cannot be the basis for a claim under the Civil Rights Acts. The court concluded that the lower court's order proximately caused plaintiff's wrongful commitment, not the actions of defendants, a county health officer and physicians. These defendants had merely instituted the incarceration proceedings. See also, Arnold v. International Business Machines, 637 F.2d 1350 (9th Cir. 1980) (Court held that absence of evidence that the corporation and employees controlled the plaintiff's arrest on the charges of stealing corporation's documents and trade secrets was not the proximate cause of plaintiff's injuries).

In the instant case, the California courts allegedly caused the injury, not the private defendants. Thus,

Sheppard, Mullin, Wambaugh, et al., were not the proximate cause of plaintiff's alleged injury. Also, as discussed above, the Court finds no evidence of the conspiracy alleged by plaintiff in the documents submitted for this motion. The Court grants summary judgment in defendant's favor under 42 U.S.C. §1985.

(c) 42 U.S.C. §1986

42 U.S.C. §1986 is a companion to §1985(3), providing a claimant with a cause of action against any person who, knowing that a §1985 violation is about to be committed and possessing power to frustrate its execution, fails to take action to frustrate it. 42 U.S.C. §1986. Because plaintiff fails to allege a claim upon which relief may be granted under §1985, plaintiff's §1986 claim must necessarily also fail.

(3) Motion for Attorney's Fees

Private defendants Sheppard Mullin, et al., also request attorney's fees, claiming that plaintiff's action is frivolous and vindictive. The Court finds merit in this argument.

28 U.S.C. §1927 states:

> Any attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorney's fees reasonably incurred because of such conduct.

The Ninth Circuit has held that the statute requres bad faith or intentional misconduct. Barnd v. City of Tacoma, 664 F.2d 1339 (9th Cir. 1982). The Court finds that plaintiff's conduct rises to the level of bad faith required to justify an award

of attorney's fees.

First, the Court holds that plaintiff's naming of the Court of Appeal and its individual justices was unreasonable. A bare minimum of research would disclose that this entity is absolutely immune from suit. See Pierson v. Ray, 386 U.S. 547 (1966).

Second, the Court agrees with defendants' contention that there is no legal or factual support for this suit. Plaintiff offers one letter, written by defendant Mittermiller to defendant Hahn, in support of his conclusory allegations that defendants conspired to deprive him of his civil rights by dismissing the appeal. This letter shows no evidence of any such conspiracy.

In sum, the court finds that plaintiff has instituted this frivolous, vexatious and unreasonable suit in bad faith, and accordingly, grants defendants' motion for an award of attorney's fees. The

Court requests that defendants submit declarations demonstrating that legal services rendered and hours and hourly rates so that the court may determine the proper amount of the award. Such a declaration should be filed by January 27, 1984. Plaintiff may file a declaration opposing the fees requested and their reasonableness and shall file his declaration, if any, by February 8, 1984. The matter will stand submitted thereafter.

IT IS SO ORDERED.

IT IS FURTHER ORDERED that the Clerk shall serve, by United States mail, copies of this Order on the plaintiff and counsel for the defendants and respondents in this matter.

Dated: January 20, 1984

/s/
Malcolm M. Lucas
United States District Judge